

STATE OF MICHIGAN
COURT OF APPEALS

CREDIGY RECEIVABLES, INC.,

Plaintiff-Appellee,

v

ROBERT F. TOWNSLEY,

Defendant-Appellant.

UNPUBLISHED

October 16, 2008

No. 280027

Oakland Circuit Court

2007-008597-AV

Before: Schuette, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant, Robert F. Townsley, appeals by delayed leave granted the June 20, 2007, circuit court order affirming the district court order granting summary disposition in favor of plaintiff and its judgment awarding plaintiff, Credigy Receivables, Inc., damages, interest, and costs and fees in the amount of \$12,859.49.¹ We affirm in part, reverse in part, and remand.

This case arises out of a Discover Card credit account opened in 1986. It is not in dispute that Townsley opened the account and used the credit card. Evidence was presented that Townsley made purchases or took cash advances using the credit card as late as June 2000. Beginning with the July 2000 statement, Discover Card assessed over the limit fees monthly until Townsley's balance fell below his credit limit. As of the September 24, 2001, monthly statement, a balance of \$5,482.07 was owed on the account. Townsley made monthly payments on the account, but the last payment on the account was apparently made on October 21, 2001, in the amount of \$110. After that time, late fees, over the limit fees, and finance charges accrued until May 31, 2002, at which time Discover Card "charged off" the account, which had a balance at that time of \$6,684.18. Discover Card then sold the account to First Select on June 17, 2002. First Select subsequently sold the account to plaintiff in December 2002.

Plaintiff commenced the present action in district court to recover the monies owed based on the breach of the credit card agreement and, as a second cause of action, sought recovery based on an account stated. Both parties moved for summary disposition. Plaintiff claimed that

¹ This figure represents damages of \$11,685.51, interest in the amount of \$898.98, and costs and attorney fees in the amount of \$275.00.

there was no question of fact that a contract existed and that Townsley failed to pay for the credit services provided under that contract, thereby breaching the contract. Plaintiff also claimed that the account became a collectible “account stated” under MCL 600.2145 because Townsley never disputed the monthly statements provided to him.

Townsley maintained that plaintiff has never produced a written contract or a copy of the original cardmember agreement between Discover Card and Townsley. Townsley contended that the failure to produce the applicable agreement precludes plaintiff’s recovery, and is also evidence that Discover Card failed to make the disclosures required under the federal Truth in Lending Act regarding the finance charges and fees applicable to the account. Townsley asserted that he has paid the principal owed on the account, and that without some evidence of an agreement regarding applicable finance charges and fees, plaintiff cannot prevail. He maintained that Discover Card’s production of a 2000 cardmember agreement does not satisfy the burden of producing the cardmember agreement in effect at the time the Discover Card account was opened.

After considering the parties’ arguments, the district court ruled in part: I will indicate that it appears there are some fact[s] that are clear and not within dispute. Certainly that Mr. Townsley did have a Discover Credit Card and did use it. There are statements that have not been objected to indicating those statement – there’s no affidavit countering that the statements have not been received so whether or not – in defendants [sic] motion a great deal of time is spent on whether or not defendant received the original contract. Frankly whether that’s the case or not, it’s clear that the card was used, that the terms of the card are listed [on] all of the statements and I am satisfied that there is – that there is a contract and no dispute as to that issue.

Townsley appealed to circuit court, which affirmed the trial court’s decision.

Townsley argues that the trial court erred by granting summary disposition in favor of plaintiff because plaintiff failed to produce evidence regarding the terms and conditions of the parties’ contract and, therefore, plaintiff cannot prevail on its claim that Townsley breached the contract.

Plaintiff’s complaint alleged that Townsley breached the Discover Card account contract. To establish such a claim, plaintiff must establish both the elements of a contract, and a breach of the contract. *Pawlak v Redox Corp*, 182 Mich App 758, 765; 597 NW2d 28 (1990). Townsley challenges the existence of a contract. In particular, Townsley contends that plaintiff’s claim should have been dismissed because plaintiff never produced a copy of the contract or the cardmember agreement containing the applicable terms and conditions as they existed at the time the account was opened.

Discover Card’s cardmember agreement states that the agreement will be governed by the laws of the state of Delaware and applicable federal laws. Under federal law, the term “credit” means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment. 15 USC 1602(e). Thus, a credit card company extends credit to an individual when it opens or renews an account, as well as when the cardholder actually uses the credit card to make purchases. *Am Exp Co v Koerner*, 452 US 233, 241; 101 S Ct 2281, 2286, 68 L Ed 2d

803 (1981). When the account is opened, the creditor has granted a right “to incur debt and defer its payment,” and when the account is used, the creditor has allowed the cardholder “to defer payment of debt.” *Id.*; *Riethman v Berry*, 287 F3d 274, 279 (CA 3, 2002) (construing “creditor” to mean someone who enters into an *agreement* with another party who uses credit to incur debt). The issuance of a credit card constitutes a credit offer, and the use of the card constitutes acceptance of the offer. See, e.g., *Jones v Citibank (South Dakota)*, 235 SW3d 333, 339 (Tex App, 2007). Townsley does not dispute that he obtained and used the credit card, and does not present evidence that he ever cancelled the account. By using the credit card Discover issued to him, Townsley entered into a binding contract with Discover card.

Townsley asserts that plaintiff failed to produce the cardmember agreement that was in existence in 1986 so as to establish the terms and conditions that Townsley accepted. However, plaintiff produced a copy of the cardmember agreement that governs all Discover Card accounts. The agreement produced by plaintiff states:

CHANGE OF TERMS: We may change any term or part of this Agreement, including any finance charge rate, fee or method of computing any balance upon which the finance charge rate is assessed, or add any new term or part to this Agreement by sending you a written notice at least 15 days before the change is to become effective. We may apply any such change to the outstanding balance of your Account on the effective date of the change and to the new charges made after that date. If you do not agree to the change, you must notify us in writing within 15 days after the mailing of the notice of change at the address provided in the notice of change, in which case your Account will be closed and you must pay us the balance that you owe us under the existing terms of the unchanged Agreement. Otherwise, you will have agreed to the changes in the notice. Use of your Account after the effective date of the change will be deemed acceptance of the new terms as of such effective date, even if you previously notified us that you did not agree to the change.

Although the agreement produced by plaintiff contains a copyright date of 2000, it is not a *different* agreement than the one in effect in 1986, but rather the same agreement as it may be amended from time to time. Townsley does not claim that he ever cancelled the account and, therefore, the 2000 cardmember agreement is applicable to his account.² The agreement contains all of the terms applicable to the account, including late fees, over the limit fees, how interest fees are calculated, minimum monthly payments, etc. Additionally, the monthly Discover Card statements produced by plaintiff contain the finance charge summary, including the annual interest percentage rate in effect. Townsley’s argument that plaintiff failed to meet its burden of establishing the terms and conditions of the contract is without merit. The trial court properly found as a matter of law that a contract existed and that Townsley defaulted on payments.

² The late fees and over-the-limit fees at issue in this case apparently occurred in 2000.

However, the exact calculation for the amount of damages sought by plaintiff is unclear, leaving it unclear how the trial court could have properly determined that Townsley actually agreed to pay the amount on which the judgment is based. The trial court granted plaintiff “damages” in the amount of \$11,685.51. However, it is not clear from the record how plaintiff arrived at the \$11,685.51 figure. As of May 31, 2002, when Discover Card wrote off the account as uncollectible, the balance was \$6,684.18. Discover Card sold the account, with the \$6,684.18 balance, in June 2002. It is unclear how that account balance increased to the \$11,685.51 sought in the complaint. The complaint simply alleges that “[t]here is due and owing on said account the sum of \$11,685.51 as of May 17, 2006 . . .” However, one exhibit dated April 17, 2006, indicates a total debt of \$13,350.62, indicating a calculation of the original balance of \$6,684.18, plus interest accrued at the rate of 18% in the amount of \$6,601.44.³ Another exhibit attached to the complaint indicates that the amount owing was \$10,524.00 as of April 15, 2006. Without some documentation or explanation from plaintiff in regard to how the \$11,685.51 figure was calculated under the terms of the alleged agreement between the parties, plaintiff has not established entitlement to a judgment in the amount awarded by the trial court as a result of any breach of contract. We therefore reverse the judgment and remand to the district court for a calculation of damages.

Townsley also argues that summary disposition should not have been granted in favor of plaintiff because there is, at least, a question of fact in regard to whether Discover Card complied with the disclosure requirements of the federal Truth in Lending Act, 15 USC 1601 *et seq.* Townsley asserts that the absence of evidence of an agreement between Discover Card and Townsley establishes that Discover Card violated the TILA by failing to disclose the terms and conditions of the credit agreement before opening Townsley’s account. Townsley contends that such a violation entitles him to damages and offsets any amount owed to plaintiff. However, a creditor must only retain evidence that disclosures were made for two years after the date the disclosures were required by the TILA. 12 CFR 226.25(a). Here, since Townsley’s account was first opened in 1986, any failure to retain evidence that the initial disclosures required by the TILA were actually made does not amount to a violation of the TILA.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald

³ The sum of these two figures is \$13,285.62, and not \$13,350.62.